92-1462

Supreme Court, U.S.
FILED
MAR 8 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1992

SEE YEE KO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MURRAY APPLEMAN
Attorney for Petitioner
A Member of the Bar of the
United States Supreme Court
225 Broadway--39th Floor
New York, New York 10007
(212) 349-6966

DICK BAILEY SERVICE (212) 608-7666 (718) 447-5358 (516) 222-2470 (914) 682-0848 Fax (718) 273-8031
1-800-564-4918

QUESTIONS PRESENTED

1. Court's refusal to rule as to the motion submitted by defendant in writing and orally, that no predisposition evidence existed prior to entry of government agents, trivilizes this Court's principles formulated in *Jacobson v. U.S.*, 112 S.Ct. 1535 (1992).

2. May a prior conviction for bribery by New York State involving gambling be admitted pursuant to Rule 404(b) solely based on defendant's attorney's opening statement that intent and knowledge must be proven by the prosecution, directly conflicting with the First and Third Circuits Courts of Appeals which bars such basis as impermissible use of prior convictions.

3. May a Court solely on its findings that one of the government's actors was an independent contractor, despite his complete control by the government, rule that it is impossible for him to be considered a government agent.

LIST OF PARTIES

SEE YEE KO, defendant in the United States District Court appealed to the Second Circuit Court of Appeals.

TABLE OF CONTENTS

Pages

Questions Presented i

The Parties ii

The Opinion of the Court Below 1

Jurisdiction 2

The Principal Constitutional and Statutory Provisions Involved 2

Statement of the Case 2

Reasons for Granting the Petition 3

POINT I--Court's refusal to rule as to the motion submitted by defendant in writing and orally, that no predisposition evidence existed prior to entry of government agents, trivilizes this Court's principles formulated in *Jacobson v. U.S.*, 112 S.Ct. 1535 (1992) 4

POINT II--May a prior conviction for bribery by New York State involving gambling be admitted pursuant to Rule 404(b) solely based on defendant's attorney's opening statement that intent and knowledge must be proven by the prosecution, directly conflicting with the First and Third Circuits Courts of Appeals which bars such basis as impermissible use of prior convictions 6

Pages

POINT III--May a Court solely on its findings that one of the government's actors was an independent contractor, despite his complete control by the government, rule that it is impossible for him to be considered a government agent 8

CASES CITED

Cases *Pages*

Boro Associates Inc. v. Levy, 253 NYS 2d 592 44 Misc. 2d 269 8

Columbia Broadcasting System Inc. v. Stokely-Van Camp. Inc., 522 F.2d 369 (CA-2, 1975) on remand 456 F. Supp. 539 8

Cruz v. State, 37 Cr.L. 1011 4

Jacobson v. U.S., 112 S. Ct. 1535 (1992) 3, 4, 5, 6

People v. Juilet, 50 cr.L. 1105 6

Shrader v. State, Nev. Sup. Ct. 38 Cr.L. 2069 6

U.S. v. Beechum (CA. 5, 1978) 582 F.2d 898 7

U.S. v. Karas, CA. 1 No. 90-2103, 11/20/91 60 L.W. 2374 6

U.S. v. Sampson, CA. 3, No. 92-3096 11/27/92 52 Cr.L. 1212 6

Pages

Other Authorities

18 U.S.C. Section 201(b)(1) and (2) 1, 2

18 U.S.C. Section 371 ..... 1, 2

Rule 404(b) 2, 7

IN THE

Supreme Court of the United States

October Term, 1992

SEE YEE KO,

Petition,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, SEE YEE KO prays that a writ of certiorari issue to review a final judgment and order of the UNITED STATES COURT of Appeals for the SECOND CIRCUIT entered 12/8/82 (Appendix A, infra) which affirmed the United States District Court, Southern District of New York, (Hon. Louis L. Stanton, U.S. D. Judge) conviction after jury trial on 2/18/92 of 3 counts bribery (Title 18 U.S. Code 201(b)(1)&(2) and Conspiracy to bribe (Title 18 U.S. Code 371). Sentencing was held on June 29, 1992 (34 Mos. incarceration, $5,000. fine, 3 year term of Supervised release and a mandatory $200. special assessment.)

THE OPINION OF THE COURT BELOW

The opinion of the Court below, namely the United States Court of Appeals for the Second Circuit affirming the decision and judgment are set forth in Appendix A, infra as aforesaid.

JURISDICTION

The order of the judgment of the United States Court of Appeals for the Second Circuit, the Court below is dated December 8, 1982. Jurisdiction of this court is invoked, made and conferred under 28 U.S.C. 1254(1).

THE PRINCIPAL CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

(a) Due Process 5th Amendment to the Constitution
(b) Title 18 U.S.C. 201 (b) (1) & (2)
(c) Title 18 U.S.C. 371
(d) Federal Rules of Criminal Procedure 404(b)

STATEMENT OF THE CASE

Solely as a result of a "sting operation" originated by the Internal Revenue Service to institute and create rather than uncover ongoing criminal activity with regard to bribery of Internal Revenue Service employees, the defendant with a great number of other orientals were snared when David Lew, (an Oriental) who originally bribed one Revenue Officer Gonzalez (the latter becoming an undercover agent) was given carte blanche actual authority by Gonzalez to contact and solicit any taxpayers obligated to the government to obtain funds for the "little business we have". Lew, without direction was able to function as Gonzalez's alter ego and was promised, a portion of the monies transacted between Gonzalez and taxpayers, whom Lew solicited. Lew's solitary unsupervised uncontrolled actions brought forth monetary rewards to him and allegations of alleged bribery to the general oriental public, where predisposition never before existed by taxpayers obligated to the government for taxes.

existed by taxpayers obligated to the government for taxes. No circumstances existed relative to bribes prior to Lew's entry on the scene with actual authority from Gonzalez.

As a result of this scenerio, Ko, originally visited by Revenue Officer Perez, who had no association with either Lew or Gonzalez to whom it was stipulated no tribute was offered or alleged, paid Gonzalez $5,000 on December 7, 1987 for which Lew received $1,500 from Gonzalez; $3,000 on April 15, 1988 and $8,000 on March 27, 1989, $2,500 of the latter amount Lew received from Gonzalez "to take care of taxes" whose liability exceeded the amounts accepted by Gonzalez.

It should be noted that all during this period of time Gonzalez used cocaine, purchased and distributed the latter and extorted over $20,000 from a taxpayer using his official position as a Revenue Officer. He further lied to a judge and other officials of the government.

At all times during trial via written motion and orally on the record, it was pressed that as a matter of law the government failed to prove beyond a reasonable doubt that Ko was predisposed to commit the act, thus entrapment barred this conviction.

Ko was convicted three years previously for bribing a New York City policeman pertaining to gambling and was incarcerated for one year. It must be presumed that rehabilitation would bar a similar act.

REASONS FOR GRANTING THE PETITION

1. Lower Court's decision trivilizes this Court's principles as stated in *Jacobson v. U.S.*, supra.

2. Conflict exists between the Second Circuit Court

of Appeals and the First and Third Circuits Courts of Appeals as to Rule 404(b) applicability

3. Agency determination has no basis in fact or law

POINT I

Must a defense of entrapment be ruled upon by the Court on Motion when as a matter of law pursuant to *Jacobson v. U.S.*, 112 S.Ct. 1535 (1992) predisposition evidence as deemed required beyond a reasonable doubt by the Government is non-existent, thus trivilizing this Court's opinion and principles.

It is undisputed that the issue of entrapment, was constantly pressed for a ruling by the Court that as a matter of law no predisposition evidence beyond a reasonable doubt independent of the Government's approaches could be gleaned from the facts herein. The Government was a manufacturer rather than a detector of crime. When first confronted with a Revenue Officer prior to Lew's introduction to Gonzalez, no effort was made by Ko to bribe or induce this Internal Revenue Service Employee to perform an illegal act. No ongoing criminal activity existed by Ko prior to being first approached by Government agents. Where a defendant has expressed his intention to rely on an entrapment defense at trial, the trial court should determine as a threshold matter whether the police conduct in issue was so egregious as to constitute entrapment as a matter of law. The issue of the defendant's predisposition to commit the charged offense should be addressed by the jury only in the event the Court finds that the actions of the agents pass constitutional muster under this "threshold test", *Cruz v. State*, 37 CrL1011 or in the alternative that ongoing illegality is occurring or evidence of predisposition prior to the act is proven by the Government beyond a reasonable doubt. Based on this Court's ruling in *Jacobson*, supra, in

appropriate circumstances as here, the issue of predisposition should be disposed of on a motion to dismiss prior to trial. The agents did not cast their acts in permissible waters.

Although a majority of this Court refused to join Justice O'Connor's dissent "that the Government must have a reasonable suspicion of criminal activity before it begins an investigation", Justice White in his opinion noted "to surmount an entrapment defense, the prosecution must prove beyond a reasonable doubt that the defendant was disposed to commit the offense charged prior to this being approached by Government agents". Here as in *Jacobson*, supra, any predisposition deemed to exist was the product of the Government Agents' efforts and ongoing criminal activity solely carried on through the Government's egrigious actions.

No basis exists to deem predisposition existed herein before the government agents (Gonzalez and Lew) came on the scene and made contact with the defendant and the oriental population in general (numerous other indictments). No criminal inclination existed by Ko independent of the government's acts and was the product of the attention that the government number of normally law abiding persons were induced to respond to the government conduct herein. Lew's actions with actual authority from Gonzalez, tempted numerous members of the oriental population whether immediately disposed to crime or not.

Focusing on the defendant's predisposition or motivation to commit a new crime, this test should still bar evidence of defendant's prior conviction or activities unrelated to the circumstances involved in the current case. Here the government encouraged and was responsible for

the instigation of a relationship that previously did not exist. Thus reprehensibility amounting to entrapment was initiated and instigated by "reprehensible" police conduct. State such as Nevada, *Shrader v. State*; Nev. Sup Ct., 38 CrL2069 and Michigan, *People v. Juilet*, 50 CrL1105) have adopted the necessity for ongoing criminal activity prior to permitting government instigation.

POINT II

May a prior conviction for bribery in New York State Court relating to gambling, 3 years previous to the present allegation, be admitted pursuant to Rule 404(b) solely based on defendant's attorney prerequisites for any bribery conviction (and as a matter of law pursuant to *U.S. v. Jacobson*, 112 S. Ct. 1535 (1992) to avoid proving beyond a reasonable doubt that entrapment exists) directly conflicting with the First and Third Circuits Courts of Appeals in *U.S. v. Sampson*, CA-3, No. 92-3096, 11/27/92, 52 CrL1212 and *U.S. v. Karas*, CA-1, No. 90-2103, 11/20/91, 60 L.W. 2374.

The government solely based on knowledge and intent issues allegedly raised by the defense in its opening statement, proof of which is always required in an indictment of this type, moved under Federal Rule of Evidence 404(b) to admit Ko's prior conviction (3 years prior hereto) for bribing a New York City police officer involving gambling. The Court admitted that there seems to be no other evidence on this issue other than arising out of conversations which were deemed unambiguous.

The Court then considered that the issue of mistake or understanding is clearly drawn in this case and permitted the government to introduce evidence of a prior act.

Rule 404(b) embodies the rule against admitting other crimes relevant only to the issue of an accused's character but permits it to be admitted for other purposes such as proof of relevancy, direct corroborations and common scheme or plans. To be admissible under Rule 404(b) evidence of extrinsic acts must be relevant to the issue other than defendant's character and its probative value must be outweighed by its undue prejudice. *U.S. v. Beechum*, 582 F2d 898, (CA-5, 1978).

Prior convictions of activities unrelated to the circumstances involved in the current case is barred by Rule 404(b).

As was stated in *U.S. v. Sampson*, Supra:

> The parameters of Rule 404(b) are not set by the defense's theory of the case; they are set by the material issues and facts the government must prove to obtain a conviction.
>
> The District Court must put a chain of inferences into the record, none of which is the inference that the defendant had a propensity to commit this crime.

The evidence did no more than to illustrate Ko's alleged bad character and to show that he acted in conformity with that character. Such is not permissible and indeed is the purpose behind the prohibition of propensity evidence in Rule 404(b). This prior conviction was totally unrelated to the circumstances involved in this case.

No circumstances existed prior to Lew's entry on the scene with actual authority from Gonzalez to pursue

solicitation of bribes from the oriental population in general.

POINT III

May a Court solely on its finding that Lew was an independent contractor, despite complete control by the government, rule that Lew was not an agent of the government.

Lew completely under the control of Gonzalez, who had to negotiate all deals, was deemed to be an independent contractor and thus not an agent of the government. Solely based on this finding Lew was not deemed a government agent.

An independent contractor, one who is not subject to right of another to control his physical conduct in performance of undertaking may or may not be an agent. *Columbia Broadcasting System Inc. v. Stokely-Van Camp Inc.* 522 F 2d 369 (CA-2, 1975) on remand 456 F. Supp. 539. The intention of parties to alleged principal - agency relationship must find expression in either words or conduct between them. *Boro Associates Inc. v. Levy*, 253 N.Y.S. 2d 592, 44 Misc.2d 269.

Based on conduct of Lew and Gonzalez there can be no doubt that Lew was an agent of the government.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted:

Murray Appleman
Attorney for Petitioner
A member of the Bar of the
United States Supreme Court
225 Broadway-39th Floor
New York, New York 10007
(212) 349-6966

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of December, one thousand nine hundred and ninety-two.

Present:

Honorable James L. Oakes,
Honorable Ralph K. Winter,
Circuit Judges,
Honorable Sonia Sotomayor,
District Judge.[*]

UNITED STATES OF AMERICA,
Appellee,

v.

ORDER
92-1412

SEE YEE KO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

---

[*]The Honorable Sonia Sotomayor, United States District Judge for the Southern District of New York, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the eighth day of December, one thousand nine hundred and ninety-two.

Present:

Honorable James L. Oakes,
Honorable Ralph K. Winter,
Circuit Judges,
Honorable Sonia Sotomayor,
District Judge.*

UNITED STATES OF AMERICA,
Appellee,

v.

ORDER
92-1412

SEE YEE KO,
Defendant-Appellant.

Appeal from the United States District Court for the Southern District of New York.

---

*The Honorable Sonia Sotomayor, United States District Judge for the Southern District of New York, sitting by designation.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

See Yee Ko appeals from his conviction and sentence for bribery of a public official and conspiracy to bribe a public official in violation of 18 U.S.C. §§ 201(b)(1), (2) & 371 (1988), after a jury trial before Judge Stanton. On appeal, Ko argues that: (1) there was insufficient evidence to support his conviction, (2) the government's sting operation constituted entrapment, (3) similar act evidence under Fed. R. Evid. 404(b) was improperly admitted, (4) the government's conduct violated his due process rights, and (5) he was improperly sentenced. We affirm.

A defendant who challenges the sufficiency of the evidence underlying his conviction "bears a very heavy burden." *United States v. Rivalta*, 892 F.2d 223, 227 (2d Cir. 1989). That burden is met and the conviction overturned only if, after viewing the evidence in the light most favorable to the prosecution, no rational trier of fact could have found the essential elements of the crime. *See United States v. Montour*, 944 F.2d 1019, 1024 (2d Cir. 1991).

Applying these standards, we conclude that the evidence was more than sufficient to support the conviction. The government relied not only on the testimony of undercover IRS officer Jerry Gonzalez, but also on numerous audio and video tapes. The evidence showed that Ko was first mentioned to Gonzalez during a meeting with David Lew at the Plum Blossom, Ko's restaurant. Lew stated that the owneres of the Plum Blossom were interested in having their "taxes taken care of." Lew, the owners of another Chinatown restaurant, had previously paid Gonzalez bribes to delay and ultimately to eliminate his restaurant's tax liabilities. Lew subsequently arranged for Ko to meet Gonzalez. Ko asked Gonzalez to take over the Plum Blossom account. Ko then agreed to pay Gonzalez $5,000 to eliminate approximately $22,000 in tax liabilities for 1986 and a portion of 1985.

Although Ko attempts to argue that he thought that the arrangement was a legal settlement of the tax liabilities, the jury could easily conclude that his method of payment belies this defense. At the conclusion of a December 7, 1987 meeting at the Plum Blossom, Ko got up from the table and placed a brown paper bag on a counter several feet away. Ko then told Gonzalez that his money was on the counter. The bag contained 500 ten dollar bills. After the meeting, Gonzalez gave Lew $1,500, the amount Lew had previously requested as his commission.

Ko also paid Gonzalez in cash on two subsequent occasions to eliminate his tax liabilities. On Aprii 1, 1988, Ko contacted Gonzalez and arranged for a meeting on April 5. After Ko was informed that he owed the IRS approximately $16,000 for a quarter of 1987, Ko then asked Gonzalez to "take care of his taxes" and agreed to pay $5,000. On April 15, an employee of Ko's, Ting Weng, paid Gonzalez $3,000 of the promised $5,000 in cash. On April 6, 1989, Ko paid Gonzalez $8,000 in one hundred dollar bills to eliminate his 1988 and a portion of his 1989 tax liabilities. At no time did Ko ask for a receipt. Although Ko now questions Gonzalez's reliability as a witness, Gonzalez was subject to cross-examination, and the jurors were able to weigh his credibility for themselves. Moreover, much of his testimony was corroborated by audio and video tape.

Finally, Ko also argues that Lew extorted the payments from Ko. However, there is little to support this version of events, and it is inconsistent with Ko's requests to "take care of" his tax liabilities. The jury was thus free to reject it.

Second, Ko may not assert the entrapment defense on appeal because he expressly waived it in the district court. Although Ko's counsel moved to have the issue of entrapment considered by the jury, Judge Stanton denied

this motion. Ko was thus on notice that the defense had to be presented to the jury. However, on two occasions Ko's counsel expressly declined to have Judge Stanton instruct the jury on the affirmative defense on entrapment:

THE COURT: . . . do you want an entrapment charge?

MR. APPLEMAN: No, your Honor.

THE COURT: It is easy to put in.

MR. APPLEMAN: I don't want an entrapment charge. Counsel also told the court: "I have not argued [entrapment] before the jury, your Honor, and I won't." Judge Stanton then acknowledged that counsel was "putting the defense just where it belongs which is on the construction to be given to the words and the question of misunderstanding or not." Nonetheless, Judge Stanton again advised Appleman that "[i]f you want to add an entrapment charge, it is very easy to do," but Appleman declined. Counsel thus made a strategic choice not to argue entrapment to the jury.

In addition, although Ko now argues that Lew acted as an agent of the government because he received a portion of the bribe paid to Gonzalez, Ko waived the derivative entrapment defense as well. In response to the court's inquiry regarding whether testimony went to derivative entrapment, Appleman responded: "not entrapment, your Honor. I'm not arguing entrapment."

Ko next argues that the court erred by admitting evidence during the government's main cause of prior similar acts under Fed. R. Evid. 404(b). However, in *United States v. Pitre*, 960 F.2d 1112 (2d Cir. 1992), we stated that although "as a general rule, the offer of evidence to prove defendant's intent or knowledge should await the conclusion of the defendant's case[,] . . . where it is apparent that intent will be in dispute, evidence of prior or similar acts may be introduced, during the government's

case-in-chief." *Id.* at 1120. In *Pitre*, the defense attorneys did not remove the issue of intent from the case, as required by *United States v. Colon*, 880 F.2d 650, 659 (2d Cir. 1989), but actually invoked lack of intent as a defense in their opening statements.

That is also the case in the instant matter. In his opening, Ko's counsel clearly demonstrated that his defense would be lack of intent to bribe, arguing that because Gonzalez was legally capable of accepting money as a tax collector, Ko intended the payments to be a legal settlement of the debt. Ko also attempted to argue that the money was extorted from him by Lew. Both defenses put Ko's intent as to the payment of the money in issue. Accordingly, Ko's prior conviction for bribery was properly admitted to prove intent and knowledge. *See* Fed. R. Evid. 404(b) (1991); *see also United States v. Mills*, 895 F.2d 897, 907 (2d Cir.), *Cert. denied*, 495 U.S. 951 (1990).

Similarly, we find appellant's arguments regarding his sentence meritless. First, the downward departure for acceptance of responsibility was unavailable to Ko who claimed again at sentencing that he had not intended the payment to be a bribe. *See* U.S.S.G. § 3E1.1. Second, Ko admits that the amount involved in Count Two was approximately $22,000, and his claim that the amount was not proved with certainty is unpersuasive. *See* U.S.S.G. § 2C1.1(b)(2)(A). Third, because the district court's exercise of judicial discretion not to grant a downward departure is unappealable, *see United States v. Colon*, 884 F.2d 1550, 1552 (2d Cir.), *cert. denied sub nom., Papathanasion v. United States,* 493 U.S. 998 (1989), we have no jurisdiction to consider Ko's claim that his sentence should have been reduced pursuant to Section 5K2.12. *See* U.S.S.G. § 5K2.12.

We have considered appellant's other arguments and find them frivolous.

Affirmed.

Hon. James L. Oakes, U.S.C.J.

Hon. Ralph K. Winter, U.S.C.J.

Hon. Sonia Sotomayor, U.S.D.J.

N.S. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.